UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

CASE NO. 05-15337-3P7

ALMA JEANNE SLIZYK

Debtor.
_____/

STEVEN A. SMILACK.

Plaintiff,

VS.

ADVERSARY NO.: 05-321

ALMA JEANNE SLIZYK

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Proceeding is before the Court upon the complaint filed by Steven A. Smilack seeking a Denial of Discharge and Exception to Discharge of Alma Jeanne Slizyk, pursuant to 11 U.S.C. § 727(a)(4)(A) and 11 U.S.C. §§ 523 (a)(4), (a)(6), (a)(2)(A) and (a)(15). The Court held hearings on this Proceeding on April 11, 2006 May 2, 2006, June 20, 2006 and July 12, 2006. At the conclusion of the hearing held on July 12, 2006, the Court issued its ruling, which is set forth in the following Findings of Fact and Conclusions of Law.[1]

FINDINGS OF FACT

1. On October 15, 2005, Defendant filed a petition for relief under Chapter 7 of the Bankruptcy Code.

2. Plaintiff and Defendant are former husband and wife. Although, the parties were divorced on June 1, 1998, they continue to fight one another in various venues of the court system in the State of Florida. Tempers run high between the parties and both sides continuously make colorful accusations against one another.

3. On June 1, 1998, the Seventh Judicial Circuit Court, in Volusia County, Florida, executed a "Final Judgment of Dissolution of Marriage" which stated that the Defendant was to pay the Plaintiff approximately $10,000. P. Ex. 1. On March 4, 2005, the circuit court executed a subsequent order increasing the amount of Plaintiff's judgment to $62,072.68. P. Ex. 2.

4. On December 2, 2005, Creditor filed a Proof of Claim in the amount of approximately $290,000. The only documentation attached to the proof of claim is the "Final Judgment of Dissolution of Marriage," in the amount of $62,072.98 and a judgment dated February 24, 2003 in the amount of $542,281. The judgment of February 23, 2003, was entered against the Defendant and in favor of the Plaintiff in conjunction with a foreclosure proceeding in the Fifteenth Judicial Circuit in Palm Beach County, Florida. In 2003, Plaintiff took title to the subject property, located at 156 Harbor Circle, Delray Beach, Florida, in 2003. Plaintiff has not obtained a deficiency judgment.

5. On Schedule A of her petition, Defendant listed real property belonging to the Plaintiff as an asset of the bankruptcy estate. Defendant testified that her schedules were filled out in good faith and that she only listed the real property, located at 156 Harbor Circle, Delray Beach, Florida, out of an abundance of caution, since in the thirty (30) days prior to her bankruptcy filing there had been a lis pendens pending upon the property. Defendant did not list the property with the intention of misleading the Court or slandering Plaintiff's title.

[1] Although the Court issued its ruling from the bench at the conclusion of the hearing held on July 12, 2006, and did not instruct either party to submit trial briefs, both parties submitted briefs to the Court. The Court notes that in addition to filing a brief which almost doubled the page limit previously set by the Court, Plaintiff, who is a licensed attorney in the State of Florida, added numerous counts in his trial brief that were not contained in the complaint he filed. As an officer of the court, Plaintiff is expected to conduct himself in an ethical manner and should not have acted unprofessionally by attempting to "slip something by the Court" in an obvious effort to gain an unfair advantage over the Defendant by alleging counts not contained in the complaint. If Plaintiff wanted to add additional counts to his complaint, subsequent to Defendant having filed her answer, he should have done so in accordance with the rules of the Court.

4. On Schedule D of her petition, Defendant made an unintentional clerical error by inaccurately listing that Plaintiff had a secured and unsecured claim of $0.00.

5. No credible evidence was proffered in support of Plaintiff's assertion that Defendant acted with the intent to harm him or that the Defendant committed fraud as part of an overarching scheme spanning eight years.

7. On May 17, 2005, the Circuit Court for the Seventh Judicial Circuit, in Volusia County, issued an order denying Plantiff's motion to impose a lien upon Defendant's property located at 516 North Riverside Drive, New Smyrna Beach, Florida. D. Ex. 31. In reaching this holding, the court stated that, "Smilack has not met the burden of proof that the transfer of the Riverside property prior to the filing of the dissolution was to avoid any payment of a debt owed to him or that it was a fraudulent transfer pursuant to F.S. 56.29." D. Ex. 31.

8. Plaintiff has appealed the ruling of the Circuit Court to the Fifth Circuit Court of Appeals, where it is currently pending.

9. Defendant has a law school degree as well as a masters degree in applied sociology. Defendant is not in optimum health but is capable of continuing to work and has the ability to pay the debts she incurred in the divorce court.

10. Discharging the debt Defendant incurred in the "Final Judgment of Dissolution of Marriage" would not result in a benefit to the Defendant that outwieghs the detrimental consequences to the Plaintiff.

CONCLUSIONS OF LAW

11 U.S.C. § 727 provides various grounds for denial of a discharge. Actions to deny a debtor's discharge pursuant to § 727 must be construed strictly against a creditor and liberally in favor of the debtor. In re Jacobs, 243 B.R.836,842(Bankr.M.D.Fla.2000). Therefore, a creditor must prove that a debt is nondischargeable by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). However, the right to a discharge in bankruptcy has limitations. Id. Once a plaintiff meets its initial burden, the ultimate burden of persuasion rests with the defendant. In re Wilbur, 211 B.R. 98, 101 (Bankr.M.D.Fla.1997).

11 U.S.C. § 727(a)(4)(A)

11 U.S.C. § 727(a)(4)(A), provides in relevant part:

(a) The court shall grant the debtor a discharge, unless-

(4) The debtor knowingly and fraudulently, in or in connection with the case-

(A) made a false oath or account

11 U.S.C. § 727(a)(4)(A).

It is well established that a deliberate omission may constitute a false oath, and thus result in a denial of the discharge. Raiford v. Abney (In re Raiford), 695 F.2d 521, 522 (11th Cir.1983); Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir.1984). However, § 727(a)(4)(A) is not meant to punish debtors for their mistakes or inadvertence. Sperling v. Hoflund (In re Hoflund), 163 B.R. 879, 882-83 (Bankr. N.D. Fla.1993). Due to the harshness of penalty, courts generally recognize that " '[t]he reasons for denying a discharge…must be real and substantial, not merely technical and conjectural.' " Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir.1994). Therefore, the discharge exception should be limited to those debtors who attempt to deny the trustee and creditors reliable information relating to their financial condition or assets. Hoflund, 163 B.R. at 882-83. To deny the discharge pursuant to § 727(a)(4)(A), a court must find that a debtor knowingly made a false oath that was both material and fraudulent. Swicegood v. Ginn, 924 F.2d 230, 232 (11th Cir.1991).

Plaintiff contends that Defendant committed a false oath by listing property belonging to him, on Schedule A of her petition, as an asset of the bankruptcy estate. Defendant, however, asserts that she only listed the property out of an abundance of caution, since in the thirty (30) days prior to her having filed her petition there had been a lis pendens pending upon the property. Defendant testified she had a good faith belief that she was merely complying with the questions asked on the bankruptcy schedules and thought that if the lis pendens provided property rights she would have been in violation of 11 U.S.C. § 727(a)(4)(d) by not disclosing this interest. Upon weighing the testimony of both parties, the Court finds Defendant's explanation to be genuine and does not find that Defendant listed the property with the intention of misleading the Court or slandering Plaintiff's title. Plaintiff also asserts that in Schedule D, Defendant inaccurately listed that Plaintiff had a secured and unsecured claim of $0.00 and that this omission is sufficient to constitute the knowing and fraudulent

making of a false oath. However, at the trial, Plaintiff testified that she completed the form to the best of her ability and that the $0.00 listed on her schedules was merely a clerical mistake. Plaintiff also asserted that she was obviously not intentionally trying to hide the fact that the Plaintiff was a Creditor of the estate as she had listed him on her schedules. Other than attempting to paint Defendant's clerical error as something sinister, Plaintiff was not able to proffer any credible evidence in support of his argument that the Defendant knowingly made a false oath. Therefore, the Court finds the inaccuracy Plaintiff points to was merely a clerical error upon the Defendant's part. Thus, the Court will not deny Defendant her discharge upon what clearly amounts to a mistake or inadvertence on her part.

11 U.S.C. § 523

This Court has held that exceptions to discharge prevent a debtor from avoiding the consequences of wrongful conduct by filing a bankruptcy case. Hall v. Johann (In re Johann), 125 B.R. 679, 681 (Bankr.M.D.Fla.1991). However, courts narrowly construe the exceptions to discharge against a creditor and liberally in favor of a debtor in order to "ensure that the 'honest but unfortunate debtor' is afforded a fresh start." Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir.1994). The Court will address each exception accordingly.

11 U.S.C. §§ 523(a)(4) and (a)(6)

> §§ 523(a)(4) and (a)(6) of the Bankruptcy Code, state in relevant part:
> (a) a discharge under section 727… of this title does not discharge an individual debtor from any debt-
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny [or] …
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]
>
> 11 .S.C. §§ 523(a)(4) and (a)(6).

11 U.S.C. § 523(a)(4)

In order to establish a claim under § 523(a)(4), the plaintiff must prove that (1) the defendant was acting in a fiduciary capacity, and (2) while acting in a fiduciary capacity, the defendant committed fraud or defalcation. NesSmith Elec. Co. v. Kelley (In re Kelley), 84 B.R. 225, 228 (Bankr.M.D.Fla.1988).

The existence of a fiduciary relationship is determined by federal bankruptcy law rather than state law. Cladakis v. Triggiano (In re Triggiano), 132 B.R. 486, 490 (Bankr.M.D.Fla.1991). Federal courts have found that "the traditional meaning of the term 'fiduciary'-a relationship involving confidence, trust and good faith-to be far too broad for bankruptcy purposes." Liberty Nat'l Bank v. Wing (In re Wing), 96 B.R. 369, 374 (Bankr.M.D.Fla.1989). This Court has held that § 523(a)(4) applies only when the plaintiff can prove the existence of an express or technical trust. Mendez v. Cram (In re Cram), 178 B.R. 537, 541 (Bankr.M.D.Fla.1995). An express or technical trust exists when "there is a segregated trust res, an identifiable beneficiary, and affirmative trust duties established by contract or by statute." Cladakis, 132 B.R. at 490.

Plaintiff alleges Defendant's debt to him should be excepted from discharge pursuant to § 523(a)(4) based upon the allegations that (1) Defendant intentionally failed to preserve the property owned in Delray by not using rent revenues to pay the mortgages on the Delray property and (2) Defendant fraudulently transferred the New Smyrna property out of her name and into her name as a Trustee for her children. Plaintiff's arguments under § 523(a)(4) are misplaced and fail to allege, no less prove, the existence of an express or technical trust between himself and the Defendant. Thus, Plaintiff has failed to comply with the requirements of § 523(a)(4).

Further, on May 17, 2005, the Circuit Court for the Seventh Judicial Circuit, in Volusia County, issued an order denying Plaintiff's motion to impose a lien upon Defendant's property located at 516 North Riverside Drive, New Smyrna Beach, Florida. In reaching this holding the circuit court stated, "Smilack has not met the burden of proof that the transfer of the Riverside property prior to the filing of the dissolution was to avoid any payment of a debt owed to him or that it was a fraudulent transfer pursuant to F.S. 56.29." D. Ex. 11. Based upon the evidence and testimony proffered, this Court agrees with the circuit court's finding that no fraudulent transfer occurred as to the New Smyrna Beach property.[2] As Plaintiff is unable to prove the

[2] The Rooker-Feldman Doctrine provides that a federal district court lacks the jurisdiction to hear a collateral attack on a state court judgment or to review final determinations of state court decisions. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). It is a jurisdictional doctrine premised on the basis that, lower Federal

requirements of § 523(a)(4) the Court does not find that Defendant committed fraud or defalcation while acting in a fiduciary capacity.

11 U.S.C. § 523(a)(6)

§ 523 (a)(6) excepts from a debtor's discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The burden of proof rests on the creditor to prove the elements of the statute through a preponderance of the evidence. Grogan, 498 U.S. at 291.

In order to be successful under § 523(a)(6), a plaintiff must demonstrate the following elements: (1) an intentional action by the defendant; (2) done with the intent to harm; (3) which causes damage (economic or physical) to the plaintiff; and (4) the injury is the approximate result of the action by the defendant. Citizens First Nat'l Bank v. Hunter (In re Hunter), 229 B.R. 851, 860 (Bankr.M.D.Fla.1999).

The Court finds there is no credible evidence, only colorful accusations made by the Plaintiff, in order to support a finding that Defendant acted with the intent to harm him. The parties have been involved in a gigantic divorce struggle since 1991. Thus, tempers obviously run high and the parties continuously hurl colorful accusations against one another. However, in order to be successful under § 523(a)(6), it is the Plaintiff's burden to prove his accusations beyond a preponderance of the evidence. After hearing hours of testimony, the Court finds that there is barely a scintilla of credible evidence in support of the various accusations made against the Defendant. Thus, Plaintiff's argument that Defendant's debt should be excepted from the discharge pursuant to § 523(a)(6) fails.

11 U.S.C. § 523(a)(2)(A)

> § 523 (a)(2)(A) of the Bankruptcy Code provides:
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-
> (A) false pretenses, a false representation, or actual fraud, other then a statement respecting the debtor's or an insider's financial condition.
>
> 11 U.S.C. § 523(a)(2)(A).

In order to except a debt from discharge under § 523(a)(2)(A), a plaintiff must prove: (1) that defendant made a false representation with the purpose and intent of deceiving plaintiff; (2) that plaintiff justifiably relied upon the representation; and (3) that plaintiff sustained a loss as a result of the representation. City Bank & Trust Co. v. Vann (In re Vann), 67 F.3d 277, 281 (11th Cir.1995); Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir.1986). Under Florida law, to prove fraud, a plaintiff must establish that the defendant made a "deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the plaintiff." First Interstate Dev. Corp. v. Ablanedo, 511 So.2d 536, 539 (Fla.1987).

Plaintiff has failed to prove the requirements of § 523(a)(2)(A). Plaintiff's argument in regards to § 523(a)(2)(A) is that the Defendant committed fraud as part of an overarching scheme spanning eight years. There is no credible evidence before the Court that Defendant carried out or orchestrated any type of fraudulent scheme. Further, Plaintiff fails to correctly address or articulate the exact requirements required to establish that Defendant's debt should be excepted from discharge pursuant to § 523(a)(2)(A).

11 U.S.C. § 523(a)(15)

Finally, the Court will determine whether Defendant's obligation under the "Final Judgment Dissolution of Marriage," should be nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

§ 523(a)(15) provides:

> (a) A discharge ··· does not discharge any individual debtor from any debt-
> (15) ··· that is incurred by the debtor in the court of divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made

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Courts are not authorized to review appeals from state court judgments. However, although the Rooker-Feldman doctrine bars a federal court from overturning a state court judgment, determining the dischageability of a judgment debt is not barred. In re Hartnett, 330 B.R. 823 (Bankr. S.D. Fla. 2005); Lasky v. Itzler (In re Itzler), 247 B.R. 546(Bankr.S.D.Fla.2000).

> in accordance with State or territorial law by a governmental unit unless-
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of the such business; or
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequence to a spouse, former spouse or child of debtor
>
> 11 U.S.C.A. § 523(a)(15).

In addition to taking into account a debtor's current financial situation, at the time of the trial, courts may also consider the debtor's future earning capabilities and long-term financial prospects. Wolfe v. McCartin (In re McCartin), 204 B.R. 647, 654 (Bankr.D.Mass.1996)[;] Johnston v. Henson (In re Henson), 197 B.R. 299, 303-04 (Bankr.E.D.Ark.1996); In re Straub, 192 B.R. at 528. " 'A court may look to a debtor's prior employment, future employment opportunities, and health status to determine the future earning potential of the Debtor." ' In re Brasslett, 233 B.R. at 184 (quoting Hart v. Molino (In re Molino), 225 B.R. 904, 908 (6th Cir. BAP 1998)).

In support of his position, Plaintiff argues that the Defendant, who has a Juris Doctorate as well as a Master Degree in Applied Sociology, is capable of repaying the debt. Defendant counters Plaintiff's argument by asserting that although she does have advanced degrees that she is in ill health and that even the income she made before becoming unemployed, was insufficient to make payments on the debt Plaintiff is alleging. Thus, she contends that discharging Plaintiff's debt would result in a benefit to her that clearly outweighs the detrimental consequences to the Plaintiff.

Upon having conducted eight (8) hours of trial, it is this Court's finding that the "Final Judgment of Dissolution of Marriage", should be excepted from Defendant's discharge pursuant to 11 U.S.C. § 523(a)(15). Both parties have spent over a decade in litigation and this Court does not find cause to discharge the dissolution judgment entered by the circuit court. In making this determination, the Court does not find that discharging such debt would result in a benefit to the Defendant that outweighs the detrimental consequence to the Plaintiff. The Court also notes that the dissolution judgment being excepted from Defendant's discharge is significantly less than the $290,000 debt alleged by the Plaintiff in his Proof of Claim. Additionally, the Court is persuaded that based upon her advanced degrees that good future employment opportunities should be available to the Defendant. Although, the Court does recognize that the Defendant has some health problems, Defendant was unable to proffer sufficient evidence that her health problems prohibit her from working in the areas she obtained her degrees in. In fact, throughout the course of the trial, Defendant asserted at various times that her main obstacle in not being able to maintain a job has had to do primarily with the ongoing litigation between herself and the Plaintiff. Thus, the Court is unable to make the finding that the Defendant does not have the ability to pay the debt incurred from the "Final Judgment Dissolution of Marriage." Thus, Plaintiff is entitled to have the debt Defendant owes pursuant to the "Final Judgment Dissolution of Marriage" excepted from the discharge pursuant to § 523(a)(15).

CONCLUSION

Based upon the above, the Court finds that (1) pursuant to 11 U.S.C. § 727(a)(4) Defendant is entitled to receive her discharge, (2) pursuant to 11 U.S.C. § 523(a)(15), the March 4, 2005, "Final Judgment Dissolution of Marriage," is excepted from Defendant's discharge, (3) Plaintiff is not entitled to have his debt excepted from Defendant's discharge pursuant to § § 523 (a)(4), (a)(6) and (a)(2)(A) and (4) neither side will be awarded any costs or fees without prejudice to proceeding in the non-bankruptcy forum.

Dated this 28 day of August, 2006 in Jacksonville, Florida.

/s/ George L. Proctor
George L. Proctor
United States Bankruptcy Judge

Copies to:
Plaintiff
Defendant